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# Commentary: Anonymous Juries in State Court

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# ANONYMOUS JURIES IN STATE COURT

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*Honorable Thomas E. Noel*

**T**oday in many urban centers it is not unusual to encounter a reluctance by many citizens to participate in the jury system. This may be due in part to the natural anxiety people feel with their first involvement in the jury process. The need to rearrange prior commitments and change schedules may also pose problems for some. Additionally, certain individuals may encounter economic hardships if their employers do not provide compensation while they serve on juries.

When a criminal case is of extended duration and attracts heightened media interest, many individuals have a greater reservation about jury service. They may become apprehensive regarding matters of outside influences, pressures, and privacy. As a result, state courts in many of the urban centers of this country may soon have to follow the lead set by some of the federal jurisdictions by implementing anonymous juries, whereby information that would identify a juror is withheld from the parties and their attorneys throughout the trial.

The jury trial is the backbone of our judicial system, and it is essential that the public confidence in the system is never compromised. To maintain its respect, the judiciary must do what is required to reduce juror anxiety and ensure that the integrity of the decision-making process is not jeopardized. Ideally, every juror should be attentive, fair, and deferential.

A trial is conducted to efficiently and fairly resolve an issue or controversy between parties. The judge and court personnel are there only to serve the public. The jury trial has endured for centuries in the United States and abroad, and no other system of trial has proven more effective or fair. Furthermore, in the criminal sector, where most of the concerns of tampering exist, there are no alternative dispute resolution methods, aside from plea bargaining, such as those provided in civil cases.

## **Anonymous Juries**

A significant area of concern in the jury process is the cognizable potential of threats to jury members. The organization of criminal activity has evolved into a sophisticated network throughout this country threatening to undermine business institutions and devastate communities. Many highly publicized trials, involving the top leadership of the large criminal enterprises, journey through the federal courts.

Because of the potential for disruption due to outside influences, many of the juries in federal trials are empaneled from veniremen whose names, addresses, ethnic backgrounds, and religious affiliations are unknown.<sup>1</sup> To date, anonymous juries, which are only utilized by the federal courts, may ultimately have to be considered in the state forum.

The top echelon of criminal activity is supported by the "rampant" crime at the grass roots level. The proliferation of violent crime from illicit drug trade occurs in the poor, uneducated areas of the community. These extreme and escalating levels of crime in the cities support the organized crime leaders. However, these "grass root" level participants are generally prosecuted in the state courts, which do not implement the personal safeguards provided in the federal courts. Consequently, in some cases state jurors may be more vulnerable to outside pressures.

The use of anonymous juries is designed to protect the jurors from outside influence and retaliation. This practice has been utilized in cases prosecuted in the federal courts under the 1970 Racketeering Influenced and Corrupt Organization Act (RICO).<sup>2</sup>

The Sixth Amendment expressly guarantees all criminal defendants "the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed . . ."<sup>3</sup> Critics of the anonymous jury trial raise two strong issues of concern: (1) the process impairs a defendant's right to exercise peremptory challenges and he is thus denied due process, and (2) the process is an infringement on the presumption of innocence.<sup>4</sup>

## **Limitations on Voir Dire and Peremptory Challenges**

The purpose of voir dire is to permit the parties to examine the panel, to ascertain those jurors they feel would best serve, and to discover any biases. The availability of as much information as possible allows the parties to investigate the veniremen and ensures candor on their part. Without the benefit of completely open questioning, it is argued one is not guaranteed the full protection against potential bias and discrimination.<sup>5</sup> Opponents further contend that the procedure restricts meaningful voir dire and undermines a defendant's Sixth Amendment right to an impartial jury.

Although the jurors's names, addresses, places of employment, and other information may be withheld, the parties

are otherwise granted wide latitude in their questioning. Trial courts have broad discretion in determining the extent attorneys may question veniremen to ascertain any basis for disqualification. The questioning must be relevant to issues of partiality as well as concerns of retribution. The examinations delve into many areas including the following:

- (1) jurors's familiarity to any party,
- (2) jurors's feelings regarding the trial process,
- (3) jurors's own prior experience with police that would impact on their impartiality,
- (4) jurors's racial attitudes,
- (5) jurors's involvement with government agencies,
- (6) jurors's occupations, and
- (7) jurors's education.

The above examples are intended to illustrate the breadth of questioning, but the list is not exclusive. As long as germane, the questioning is without limit.<sup>6</sup>

During voir dire each panel member is assigned a number and is referred to throughout the trial solely by that number. The questioning may be very detailed, and the initial phase may be done via written responses.<sup>7</sup> Additionally, the attorneys have the opportunity to observe the panel. Attorneys may note a person's demeanor, dress, manner of movement, and style of articulation. All of these may have an obvious bearing on the exercise of peremptory challenges.<sup>8</sup>

While the Constitution guarantees a criminal defendant the right to a public trial before an impartial jury, there is no such guarantee to the voir dire process or to the right to raise peremptory challenges. Therefore, there is no need for a review of the voir dire process with the close scrutiny reserved for encroachments of fundamental rights of the accused.<sup>9</sup> "As long as a defendant's substantial rights are protected by a voir dire designed to uncover bias as to issues in the cases and as to the defendant himself, then reasonable limitations on the questioning should not be disturbed on appeal."<sup>10</sup> The anonymous process would make for a deviation from the normal procedure. However, when weighed against the elimination of improper influence and the well-being of the jury, its use is more than justified.

### Presumption of Innocence

The totality of the criminal court's setting must be considered when weighing the need for an anonymous jury against the accused's rights. Defense counsel may argue that this method of trial will have but adverse effects on his client because jurors may conclude that the trial is conducted with an anonymous jury because the defendant has a criminal proclivity.

Defense counsel may further maintain that the presump-

tion of innocence is irreparably damaged by an anonymous jury, and a fair trial is impossible. Additionally, he may assert that a juror's impartiality is already compromised by the elaborate court security and that this, coupled with an anonymous jury, will give the presumption of innocence little, if any, meaning.

No per se rule, however, prohibits burdening the presumption of innocence to accommodate a compelling right or vital interest of the state.<sup>11</sup> Juror anonymity, though unusual, strikes a reasonable balance between the defendant's right to be cloaked in innocence and society's need to protect jurors and preserve the integrity of the trial.<sup>12</sup>

Over the years courts have had to institute measures for security of the process that arguably could prejudice a defendant in the eyes of a jury. Limitations of these rights will be tolerated as long as they are reasonable when weighed.

### Are Anonymous Juries Warranted?

There is little question that jurors can actually be targeted by involved parties. For instance, in *United States v. Edmond*,<sup>13</sup> an anonymous jury was used because it became apparent efforts were being made to learn the identity of jurors. In fact, defense counsel informed the court that one juror had been identified. During the trial young men and women were noticed going in and out of the courtroom, communicating with defendants by facial and body language. It was obvious to the court the defendants were attempting to discover the identity of panel members.

The real issue becomes the actual potential for juror identity to be ascertained and a case jeopardized. Jurors in state courts are subject to a greater risk than jurors in federal courts. This is because jurors for the United States federal district courts are selected on a statewide basis whereas veniremen for state courts are selected from their respective judicial districts, which are much smaller than the federal districts. For example, in the Circuit Court for Baltimore City, all veniremen are drawn solely from the city.

In Baltimore, as in many other cities, more and more citizens are becoming eligible for and participating in the jury process. The smaller judicial districts of state courts raise genuine concerns for possible disruptions of trials. For example, in the middle of a trial in which I presided, a juror acknowledged knowing a witness, whose name he had not recognized on voir dire. Additionally, jurors often reside in the same neighborhood as the crime scene or the location of an incident. Also, another situation existed in which the voir dire did not elicit that two jurors were cousins. The above instances typify what are not unusual occurrences in one state court because of the limited pool for selection.

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There were over 7,300 felony narcotic cases prosecuted in one ten month period in Baltimore City, many resulting in guilty pleas. "Counting such 'drug related' crimes as murder, robberies, thefts and burglaries, approximately eighty-five percent of all felony cases in Baltimore involve illegal drugs."<sup>14</sup> It is beyond question that much of the distribution aspect of the drug traffic is well-organized with a good portion coming into the city from New York on a regular basis. Turfs are fought for and zealously protected by the self-policing organization. When the heads of the local crime organizations are prosecuted, we have the attendant media publicity legitimately letting the public know efforts are being made on their behalf.

I do not find it unreasonable to give serious consideration to anonymous juries in such state court proceedings. The criteria established by the federal court is very evident in the state, with the attendant concerns. As Judge Charles R. Richey stated in *U.S. v. Edmond*:

Preservation of the anonymity of a jury is appropriate when there exists realistic threats of violence or jury disruption . . . . The court need not wait for the occurrence of an untoward event before concluding that the threat of violence is realistic . . . . Instead, the court can find a realistic threat of violence based upon violent acts allegedly attributed to members of an illegal enterprise.<sup>15</sup>

In fact, the express concerns may be of a more urgent nature in state court in light of the limited size of the pool. I have been involved in the legal system for over twenty years and am quite aware of cases in which attempts to influence witnesses have occurred. These cases involved defendants who were participating in on-going criminal activity. The violent crimes and the boldness and daring of the participants are increasing. Additionally, this overt conduct seems to be perpetrated by younger individuals as time goes by. I am not aware of any jury tampering cases at the state level. I fear, however, their time may be coming. If witnesses can be tampered with, it is only a matter of time before jurors are targeted, particularly in light of the daring nature of the young criminal defendants and the obvious organization behind many of them.

Whenever there is a realistic concern of outside influences, efforts must be made to guarantee the integrity of the system and safety of its participants. Coercion of witnesses often presents cause for concern of jurors. Therefore, our system, which allows extensive disclosure of information relative to jurors, must be reviewed in certain cases.

Additionally, the mind-set of the jurors must be addressed. Jurors have concerns about their safety and the

degree of notoriety they may receive. Some years ago, I presided over a well-publicized homicide case in which a Baltimore City police officer was charged with murder in the death of a motorcyclist. Throughout the trial, the media tried to gain access to the list of jurors which contained detailed information about them. The first case ended in a mistrial, and the matter had to be retried.

In the subsequent trial it was agreed that the media could not be present during the voir dire process, which was done on an individual basis. However, the jurors were identified solely by an assigned number. Only the defendant, the attorneys, and the court personnel were in the courtroom as each juror was questioned. Because of concerns generated in the first case, one of the voir dire questions was designed to determine if the juror objected to disclosure of personal information. Over 100 veniremen were interviewed and only two had no objection to disclosure. From the responses and the questions the jurors had, it became very apparent personal safety and privacy were very much on their minds.

The colloquy with the jurors also revealed that many of them had no idea court records are public documents and available to anyone who wants access. Many of the jurors expressed true surprise to learn that the jury list was public record and personal information about them was available for public inspection.

That experience led me to question how citizens would react if they were more knowledgeable about the process. I imagine that without some safeguards concerning privacy, it might become very difficult to seat a jury in some of the highly publicized criminal cases, particularly if they knew the media wanted access to the jury list. I also feel mem-

bers of the judicial system have an obligation to be honest and candid with veniremen and jurors, especially in matters concerning disclosure of personal information. It would be unfair to permit a panel to assume the lists were confidential if the court knew the media had gained access.

Additionally, if the media does not act responsibly in such matters, the courts may have to address the media's conduct. In the above situation, I could not imagine what use would have been made of the list if access had been permitted. I cannot fathom any responsible journalist either attempting to locate and discuss the case with a juror or printing the names of the panel members. An anonymous system would address this problem.

It follows that the jury process in the state courts of Maryland may have to be revisited to address the concerns of our modern day. In situations with an articulable suspicion

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of a potential problem involving the integrity of the jury process, we must not wait "for the occurrence of an untoward event." Safeguards must be implemented to avoid jury disruption, and the anonymous system should be fully explored to help accomplish this. Anonymous juries would also address and resolve potential problems generated by the media coverage of trials.

### Conclusion

Limitations on the rights of an accused will be tolerated as long as they are reasonable. If anonymity dispels the apprehensions of the jury, it serves the ideal of dispassionate justice.

The jury system purports to allow individual jurors to fade into the community once their tenure is completed. Accordingly, anonymity would seem entirely consistent with this concept rather than anathema to it.

### About the author:

The Honorable Thomas E. Noel serves as a judge on the Circuit Court for Baltimore City.

### Endnotes:

<sup>1</sup>*United States v. Persico*, 621 F. Supp. 842 (S.D.N.Y. 1985).

<sup>2</sup>*See United States v. Barnes*, 604 F.2d 121 (2d Cir. 1979). *See also* Eric Wertheim, *Anonymous Juries*, 54 Fordham L. Review 981 (1986).

<sup>3</sup>U.S. Const. amend. VI.

<sup>4</sup>*United States v. Scarfo*, 850 F.2d 1015 (3d Cir. 1988), *cert. denied*, 488 U.S. 910 (1988).

<sup>5</sup>Case Comment, *Voir Dire Limitations as a Means of Protecting Jurors: Safety & Privacy*, 93 Harv. L. Rev. 782 (1980).

<sup>6</sup>*See Scarfo*, 850 F.2d at 1015-1029.

<sup>7</sup>*See United States v. Barnes*, 604 F.2d 121 (2d Cir. 1979).

<sup>8</sup>*United States v. Edmond*, 718 F. Supp. 109 (D.D.C. 1989).

<sup>9</sup>*See Scarfo*, 850 F.2d at 1015.

<sup>10</sup>*United States v. Barnes*, 604 F.2d 121, 140 (2d Cir. 1979).

<sup>11</sup>*Edmond*, 718 F. Supp. 109 (D.D.C. 1989).

<sup>12</sup>Eric Wertheim, *Anonymous Juries*, 54 Fordham L. Review 981 (1986).

<sup>13</sup>718 F. Supp. 109.

<sup>14</sup>J. Kenneth Johnson, *The War on Drugs Is Mostly Eyewash*, *The Baltimore Sun*, June 21, 1992, at 1L.

<sup>15</sup>*Edmond*, 718 F. Supp. at 110.

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